IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. 43

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ET AL.,
Petitioners,

vs.

BIRDIE MAE DAVIS, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

and

~~MOTION FOR STAY OF THE MANDATE BY THE COURT OF APPEALS PENDING REVIEW BY THIS COURT.~~

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, CHARLES E. McNEIL, WILLIAM B. CRANE, JACK C. GALLALEE, ARTHUR F. SMITH, KENNETH REED and CRANFORD H. BURNS, Petitioners,

By: GEORGE F. WOOD,
PALMER PILLANS,
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JOSEPH F. JOHNSTON,
Counsel for Petitioners.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

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vs.

BIRDIE MAE DAVIS, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Board of School Commissioners of Mobile County, Charles E. McNeil, William B. Crane, Jack C. Gallalee, Arthur F. Smith, Kenneth Read, and Cranford H. Burns, pray that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Fifth Circuit on motion for injunction pending appeal, entered July 9, 1963, as amended on July 18, 1963, following an application for a rehearing. The appeal was from an order of the United States District Court for the Southern District of Alabama, entered June 24, 1963, denying a motion for a preliminary injunction in a suit seeking the desegregation of the Mobile County school system.

OPINIONS BELOW.

Neither opinion below has been reported. The first opinion of the Court of Appeals is at Appendix page 9, the opinion on rehearing issued July 18, 1963, at Ap-

pendix page 15, and the opinion of the District Court is at Appendix page 22.

JURISDICTION

The jurisdiction of this court on petition for certiorari is invoked under 28 U. S. C., Sec. 1254 (1).

The jurisdiction of the court to grant the motion for stay of the mandate of the Court of Appeals is invoked under Title 28, Sec. 1651 (The "all writs" statute).

QUESTIONS PRESENTED

Whether the court below erred in directing the District Court to enter a preliminary injunction contrary to the District Court's better judgment when the effect of such an injunction is that of a final decree before trial of the case and without any record.

The second question is whether the court below erred in refusing to give effect to the discretion of the District Court in the matter of the issuance of preliminary injunction in an area of sensitive public concern.

STATUTES INVOLVED

The statutes involved are the Alabama Pupil Placement Act (Title 52, Sec. 61 (1) et. seq., Code of Alabama, 1940, as revised); sustained as valid on its face in **Shuttlesworth v. Birmingham Board of Education**, 358 U. S. 101 (1958); 28 U. S. C., Sec. 1254 (1); 28 U. S. C., Sec. 1651; and 28 U. S. C., Sec. 2101 (f).

STATEMENT OF THE CASE

This action was commenced in the District Court of the United States for the Southern District of Alabama, on March 27, 1963. The complaint sought an order (1) desegregating the school facilities of Mobile County, or, in

the alternative (2) requiring the presentation of a plan by the petitioners, within a time fixed by the court, to accomplish the desegregation.

A companion motion was filed denominated "Motion for Preliminary Injunction" but permanent, rather than interlocutory, relief was sought therein. At the request of the respondents here (plaintiffs below), the so called "Motion for Preliminary Injunction" was set for hearing. On April 25, 1963, the motion was heard and for the first time respondents orally requested interlocutory relief, asking the court to order the petitioners to submit a plan within 30 days. The District Court took the matter under submission and granted time to both parties to file briefs. Before the expiration of the period for filing briefs and while the matter was still under submission, plaintiffs below appealed to the Court of Appeals for the Fifth Circuit. That appeal was dismissed by the Court and the matter restored to the District Court docket.

On June 24, 1963, the District Court entered an order (Appendix page 22) declining to require the submission of a plan affecting the school year 1963-64 because of administrative difficulties in accomplishing any desegregation within the period then remaining before the commencement of the 1963-64 term. In the same order the court set the case for hearing on November 14, 1963, and required that the School Board present at that time a plan for the desegregation of the public schools of Mobile County, commencing with the school year 1964-65. The District Court made findings of fact and filed with its order an opinion (Appendix page 26).

Respondents here appealed from this order and filed a motion with the Court of Appeals for the Fifth Circuit seeking a preliminary injunction, pending appeal, to order the petitioners to file a plan to affect the school year 1963-64. This motion was set specially and heard on

July 8, 1963. On July 9 the Court of Appeals issued an injunction requiring the presentation of a plan on August 1, 1963, and prescribed that said plan should require the desegregation of the first grade in Mobile County schools in the year 1963-64 and at least one additional grade each year thereafter. Upon motion by petitioners for a rehearing before the Court of Appeals, its order was amended to require the presentation of a plan by the School Board on August 19, 1963, which would provide for the effective application of the Alabama Pupil Placement Act and for the commencement of the desegregation of the schools of Mobile County in September, 1963, and thereafter.

Never, at any time, was there a certified record before the Court of Appeals and the entire factual presentation took the form of affidavits by two of the plaintiffs below and two of the petitioners here.

REASONS FOR GRANTING THE WRIT.

In the second **Brown case**, 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083, this Honorable Court admonished the Appellate Courts to accord to the District Courts a measure of discretion in the desegregation process, for the sound reasons that the District Courts were close to the local problems, to the school officials and the children involved. In the proper exercise of this sound discretion, supported by the findings set out in the appendix to this petition, page 22, the District Court found that it would be entirely impracticable to commence the desegregation process so near to the opening of a new school year. This conclusion was founded in a knowledge of local conditions, including a grossly overcrowded school system and in the community of good will. At the same time, the court recognized the necessity that such desegregation process commence and, in an effort to avoid delay, re-

quired that the School Board present at the hearing of the case on the merits in November, 1963, a plan to become effective in the school year commencing September, 1964. Under such orderly and logical procedure, the petitioners would have been accorded their rights and at the same time a proper safeguard would have been thrown around the rights of the respondents herein. Following a determination by the District Court, upon the trial, of the relative rights and obligations of the parties, a consistent order could be entered, with a plan already prepared.

Instead, the Court of Appeals has substituted its own judgment and discretion to completely reverse that of the District Court. It has, in effect, entered a final decree in the matter by way of a preliminary injunction, pending appeal, thereby affording to the plaintiffs below all the relief sought and to which they could have been entitled, following a trial of the cause. It has entered an order that could be disruptive of the school system in the year approaching.

Petitioners are aware that this Honorable Court has held that the passage of time since the Brown cases calls for action more promptly than has been the rule in the intervening years. However, petitioners submit that the action contemplated by the District Court is prompt action, as clearly appears from the factual summary in the District Court's opinion, and would not be disruptive of the basic school system as might well be the result of an effort such as is prescribed by the Court of Appeals. Such precipitate action, calling for a reorganization of a school system of 75,000 pupils in a six-weeks period, setting at nought the discretion of the District Court, is not justified by the circumstances.

It is submitted, with respect, that the action of the Court of Appeals exemplifies the undertaking to operate

the public schools by edict from the Appellate Court level. Rather than fulfilling the supervisory function, which this Honorable Court prescribed for the Courts of Appeal in the second **Brown** case, the Appellate Court has acted in the first instance; not to oversee, but as the trial court, and in contravention of the undisputed facts.

For the reasons stated, it is submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, CHARLES E. McNEIL, WILLIAM B. CRANE, JACK C. GALLALEE, ARTHUR F. SMITH, KENNETH REED and CRANFORD H. BURNS, Petitioners,

By George F. Wood
GEORGE F. WOOD,
PALMER PILLANS,
A. L. PHILIPS, JR.,
JOSEPH F. JOHNSTON,
Counsel for Petitioners.

I certify that a copy of the foregoing petition, together with the motion for stay of mandate, was on the 8 day of August, 1963, served on counsel for respondents by mailing a copy to Mr. Vernon Z. Crawford, 578 Davis Avenue, Mobile, Alabama; Mr. Clarence E. Moses, 1050½ Davis Avenue, Mobile, Alabama, and Mrs. Constance Baker Motley, 10 Columbus Circle, New York, New York, by United States mail, postage prepaid.

George F. Wood

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. .....

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ET AL.,
Petitioners,
vs.
BIRDIE MAE DAVIS, ET AL.,
Respondents.

MOTION FOR STAY OF MANDATE OF COURT OF APPEALS PENDING DECISION OF PETITION FOR WRIT OF CERTIORARI.

By an order of the Court of Appeals for the Fifth Circuit, finally settled on July 18, 1963, petitioners are required to desegregate its schools in September, 1963, and thereafter. They are thereby required to replan and readminister within a period of six weeks a 75,000-pupil school system. In view of the disruption of the school system that could result from such an order, petitioners pray that the mandate of the Court of Appeals be stayed, pending a decision by this Honorable Court on the petition for writ of certiorari filed herewith.

Application for stay was made on August 5, 1963, to the Honorable John Minor Wisdom, Judge, Court of Appeals for the Fifth Circuit, a member of the panel issuing mandate. The application for stay was denied.

Respectfully submitted,

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, CHARLES E. McNEIL, WILLIAM B. CRANE, JACK G. GALLALEE, ARTHUR F. SMITH, KENNETH REED and CRANFORD H. BURNS, Petitioners.

By George F. Wood
GEORGE F. WOOD
PALMER PILLANS,
A. L. PHILLIPS, JR.,
JOSEPH F. JOHNSTON,
Counsel for Petitioners.

APPENDIX.

OPINION OF COURT OF APPEALS.

In the
United States Court of Appeals
For the Fifth Circuit.

No. 20657.

Birdie Mae Davis et al.,
Appellants,
versus
Board of School Commissioners of
Mobile County et al.,
Appellees.

On Motion for Injunction Pending Appeal
and for Other Orders.

(July 9, 1963.)

Before Brown, Wisdom and Bell, Circuit Judges.

Per Curiam: Plaintiffs here seek an injunction by this Court pending our determination of the merits of an appeal from an order entered on June 24, 1963, by the District Court for the Southern District of Alabama. This suit originated when Plaintiffs filed a class action seeking the desegregation of the Mobile County school system. Plaintiffs sought an immediate order requiring the Defendant School Commissioners to submit a plan of de-

segregation within thirty days. This motion was denied by the District Court. In the alternative, Plaintiffs sought a preliminary and permanent injunction prohibiting the further operation of segregated schools. The Court took this motion under submission and ordered briefs to be filed within a specified time. Plaintiffs appealed from this ruling asserting that the failure to immediately rule on the motion for preliminary injunction amounted to a denial of the motion. On that appeal, this Court held that the trial Judge had not abused his discretion. **Davis v. Board of School Commissioners of Mobile County**, May 24, 1963, ... F. 2d ... [No. 20558].

Subsequently, the District Court held a hearing and made the following determination. By its order of June 24, the Court denied Plaintiffs' motion for preliminary injunction. The case was set for trial on November 14, 1963 and the Defendants were directed "to present at the trial * * * a specific plan for the operation of the schools under their authority and control on a racially non-discriminatory basis, consistent with the principles established by the Supreme Court, to commence not later than the beginning of the 1964-65 school year." It is from this order that Plaintiffs have appealed to this Court, seeking in the meantime an injunction requiring the Mobile County schools to commence integration not later than September 1963.

We are in agreement with Plaintiff's theory. The Defendant Board has not come forward with an acceptable reason why the integration program should be further delayed. No one disputes that the public schools of Mobile County are presently operated on a segregated basis.

> "It is now more than nine years since this Court held in the first **Brown** decision * * * that racial segregation in state public schools violates the Equal Protection Clause of the Fourteenth Amendment.
>
> "* * *

"Given the extended time which has elapsed, it is far from clear that the mandate of the second **Brown** decision requiring that desegregation proceed with 'all deliberate speed' would today be fully satisfied by types of plans or programs for desegregation of public educational facilities which eight years ago might have been deemed sufficient. **Brown** never contemplated that the concept of 'deliberate speed' would countenance indefinite delay in elimination of racial barriers in schools * * *." **Watson v. City of Memphis**, 1963, ... U.S. ..., ... S. Ct. ..., ... L. Ed. 2d ... [31 L. W. 4498].

"Now * * * eight years after [the second **Brown** decision] was rendered and over nine years after the first **Brown** decision, the context in which we must interpret and apply this language [all deliberate speed"] to plans for desegregation has been significantly altered." **Goss v. Board of Education of City of Knoxville**, 1963, ... U. S. ..., ... S. Ct. ..., ... L. Ed. 2d ... [31 L. W. 4559].

The District Judge in his memorandum opinion discusses two principal reasons why preliminary injunctive relief should not now be granted. The first is that there would be an impossible administrative burden placed on the school system. The second is the Court's belief, based upon experience over the past several years in other race civil rights matters, that if this action is not too hastily taken, the problem will work itself out with no strife or similar consequences.

For reason which bear on both of these, we think neither of these grounds is sufficient. The administrative problem is not one created by the Plaintiffs. They have for nearly a year sought without success to get the school authorities to desegregate the schools. The fact that the suit was not filed until March 1963 is not therefore of

controlling importance. As to the second ground, there is nothing on the present record to afford either the District Judge or this Court any assurance that the requested forebearance will produce effective results. The Defendants have not even answered as yet. They have filed a motion to dismiss for failure to state a claim. Although it seems to be acknowledged on all hands that a racially segregated system is still maintained, the Defendants' legal position under this motion is that the Plaintiffs have not set forth a claim entitling them to relief. So far as this record shows, the Defendant school authorities have not to this day ever acknowledged that (a) the present system is constitutionally invalid or (b) that there is any obligation on their part to make any changes at any time. At this late date the Plaintiffs, who represent Negro children who are presently being denied constitutional rights, are entitled to minimum effective relief. With the trial date now fixed in November, it means that effective relief is denied for another school year with no assurance that even at such later date anything but a reaffirmation of the teaching of the **Brown** decision will be forthcoming. The Plaintiffs showed a clear case entitling them to interim relief pending a final hearing, and it was an abuse of the District Court's discretion not to enter a preliminary injunction.

The "All Writs" statute, 28 U. S. C. A., § 1651, gives us the power to grant the relief sought by Plaintiffs. **Stell v. Savannah-Chatham County Board of Education**, 5 Cir., 1963, ... F. 2d ... [No. 20557, May 24, 1963]. However, as in that case, we think it more appropriate to frame the injunction and direct by mandate that this injunction be made the order of the District Court.

It is, therefore, Ordered that the District Court for the Southern District of Alabama enter the following judgment and order:

"The Defendant, Board of School Commissioners of Mobile County and the other individual Defendants, (naming them specifically) and their agents, servants, employees, successors in office and those in concert with them who shall receive notice of this order, be and they are hereby restrained and enjoined from requiring and permitting segregation of the races in any school under their supervision, from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially non-discriminatory basis with all deliberate speed as required by the Supreme Court in Brown v. Board of Education of Topeka, 1955, 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083.

"It is further ordered, adjudged and decreed that said persons be and they are hereby required to make an immediate start in the desegregation of the school of Mobile County, and that a plan be submitted to the District Court by August 1, 1963, which shall include a statement that the maintenance of separate schools for the Negro and white children of Mobile County shall be completely ended with respect to the first grade during the school year commencing September 1963, and with respect to at least one successively higher additional grade each school year thereafter."

The District Court may modify this order to defer desegregation of rural schools in Mobile County until September 1964, should the District Court after further hearing conclude that special planning of administrative problems for rural schools in the county make it impracticable for such schools to start desegregation in September 1963.

This order shall remain in effect until the final determination of the appeal of the within case in the Court of

Appeals for the Fifth Circuit on the merits; and until the further order of this Court. During the pendency of this order the trial court is further directed to enter such other and further orders as may be appropriate or necessary in carrying out the expressed terms of this order.

The Clerk is directed to issue the mandate forthwith.

Bell, Circuit Judge, Dissenting:

I dissent. I would support the view of the District Judge that the time remaining before the opening of school in September is insufficient to make the change from a segregated to a desegregated school system as requested.

The chance of disruption of the educational process in Mobile likely to be encountered in planning and effecting the necessary changes on such short notice outweighs the damage which may be incurred by Plaintiffs in waiting another year. Thus, I would not hold that the District Judge abused his discretion. The loss of the year can be made up by requiring that two grades be desegregated beginning in 1964. I would join in the order if it encompassed this change.

Time for the effectuation of orderly school management procedures is essential and we should be careful not to give rise to an untoward situation in school administration at this late hour. Registration for the upcoming term has been completed, and school officials and staffs are in the vacation season. This is particularly so where we are passing on a motion in a case not filed until March, 1963.

OPINION OF COURT OF APPEALS ON REHEARING.

In the United States Court of Appeals
For the Fifth Circuit.

No. 20637.

Birdie Mae Davis et al.,
Appellants,

vs.

Board of School Commissioners of
Mobile County et al.,
Appellees.

On Motion for Injunction Pending Appeal
And for Other Orders.

On Petition for Rehearing.

(Filed Jul 18, 1963.)

Before Brown, Wisdom and Bell, Circuit Judges.

Per Curiam:

This matter is before the Court on the petitioners' application for a rehearing.

July 9, 1963, this Court by mandate directed the District Court to enter an injunction and order requiring the Board of Commissioners of Mobile County to submit to the District Court by August 1, 1963, a step-ladder plan for desegregating the public schools in Mobile, starting with the first grade in September, 1963. Three days later, another panel of the Court decided Armstrong v. Board of Education of the City of Birmingham, No. 20595. In that case the Court declined to issue an injunction pending appeal which would go so far as to provide "when

and how the complete desegregation of the public schools may be accomplished.'" The Court's mandate requires the Birmingham School Board to submit by August 19, 1963, a plan for an immediate start in desegregation by applying the Alabama Pupil Placement Law to all school grades.

At this initial stage in the travail of desegregating the public schools in Alabama, the School Boards of Mobile and Birmingham face substantially the same social, legal, and administrative difficulties. We express no opinion of the merits of uniformity in school desegregation as against a school Board's tailoring a plan and a trial judge's shaping a decree to fit a particular school system. But we have reached the conclusion that at this early point in the legal proceedings, at a time when no school board in Alabama has formulated any plan for desegregation, there should not be one law for Birmingham and another for Mobile. We have decided therefore to conform the Mobile order to the Birmingham order.

Accordingly, the Court amends the judgment and order of July 9, 1963, issued as the mandate, by deleting the following paragraph:

> "It is further ordered, adjudged and decreed that said persons be and they are hereby required to make an immediate start in the desegregation of the school of Mobile County, and that a plan be submitted to the District Court by August 1, 1963, which shall include a statement that the maintenance of separate schools for the Negro and white children of Mobile County shall be completely ended with respect to the first grade during the school year commencing September 1963, and with respect to at least one successively higher additional grade each school year thereafter."

and, in lieu thereof, directs the District Court for the Southern District of Alabama to enter the following paragraph as its judgment and order:

> "It is further ordered, adjudged and decreed that said persons be and they are hereby required to submit to this Court not later than August 19, 1963, a plan under which the said defendants propose to make an immediate start in the desegregation of the schools of Mobile County, Alabama, which plan shall effectively provide for the carrying into effect not later than the beginning of the school year commencing September 1963 and thereafter of the Alabama Pupil Placement Law as to all school grades without racial discrimination, including 'the admission of new pupils entering the first grade, or coming into the County for the first time, on a nonracial basis,' **Augustus v. Board of Public Instruction**, 5 Cir. 1962, 306 F. 2d 862, 869 (that opinion describes such a plan which has been approved and is operating in Pensacola, Florida)."

As in the Birmingham decision, the order contemplates a full hearing before the District Court. The District Court will therefore go forward with the trial already fixed for November 14, 1963.

Except to the extent expressly granted herein, the petitioners' application for a rehearing is denied.

The Clerk is directed to issue the mandate, as amended, forthwith.

Bell, Circuit Judge, concurring in part and dissenting in part:

The modification by the majority of their prior order in this case compounds error. Of course, I agree to the modi-

fication to the extent that it may alleviate disruption of the educational process in Mobile during the 1963-1964 school term.

My understanding of this latest order is not altogether clear. It appears to simply require activation, under some plan yet to be worked out, of the Alabama School Placement Law, which was adopted by the Legislature of that State in 1957, and which was approved as constitutional on its face in **Shuttleworth v. Birmingham Board of Education**, N. D. Ala., 1958, 162 F. Supp. 372, affirmed 358 U. S. 101, 79 S. Ct. 221, 3 L. Ed. 2d 145. It is not likely that any appreciable amount of desegration will take place under that law at this late date. The protective measures assured by Judge Lynne in the **Armstrong** case of a hearing on complaints if and where the plan or law is administered on the basis of race on five days' notice is not present in Mobile. It is an inherently complicated law providing many factors which may be considered in making pupil assignment. We have only recently eliminated two of them in the Atlanta school case where we said that the use of scholastic standards and personality interviews as a basis in transfer and assignment were illegal per se when applied only to Negroes. **Calhoun v. Latimer**, No. 20,273, 5 Cir., 1963, ... F. 2d .... Others were eliminated or limited when that case was in the District Court. **Calhoun v. Board of Education**, N. D. Ga., 188 F. Supp. 401. Working out a meaningful plan will not be easy and will require more than the cursory and perfunctory treatment the case has received here.

Moreover, what was done in Birmingham may or may not be relevant to Mobile. The case there had been pending in the District Court some three years. The District Court conducted a hearing and had certain representations from the school board as to how the Pupil Placement Law would be administered. Here no party has ever mentioned using this law. The District Court has never considered it.

This case is set for trial on the merits in November. A pending motion to dismiss is set at the same time. The District Court has ordered the school board to propose at that time a plan for desegregation of the school system beginning in September, 1964, within the teachings of the Supreme Court decisions on that subject.

It has been the position of appellants that their ultimate right to a desegregated school system is cast in doubt by the pending motion to dismiss, and the fact that the case is set for trial on the merits even though the school system is now segregated. One of the real thrusts of the appeal is their contention that they cannot be certain that desegregation will become a reality in the school term commencing in September, 1964, because of this posture of the case. An order of the type originally entered but making desegregation effective with the beginning of school in September, 1964, and in at least two grades, should serve to dispel this doubt and the record warrants such an order. It warrants nothing more. The school board would have the opportunity in the interim of formulating a desegregation plan, subject to court approval, and making ready for the good faith adaptation of the plan.

The modification has been neither sought nor considered and will come as a great surprise to all. It will in all probability be ineffective. I do not understand the inordinate hurry in this case. It has only been pending three and one half months. It has been to this court twice in that short time.

Probably no party will consider this relief granted or denied to be a victory, but what has been done is at the expense of the judicial process. A Court of Appeals should not sit as a District Court in chancery to mold and enter an equitable decree affecting an entire school system.

in a metropolitan community without hearing from the parties on the nature of the decree, and without facts before it to serve as a basis for the decree. The All-Writs Statute, 26 U. S. C. A., § 1651, does not authorize this. It must contemplate rules of procedure, notice, record facts, and an opportunity to be heard, all after time for consideration by the District Court. It applies only in cases of emergency proportions. To state this belief is to at once demonstrate that I cannot join in the procedure here. Therefore, I must dissent, except as otherwise stated, with the admonition that more constitutional rights will be lost than gained in the long run by departure from procedures which have stood the test of time, and which are a part of due process of law as we have heretofore known it. In fact, more may be eventually lost in this very case.

While this appeal must have been considered as presenting something in the nature of a judicial emergency in the beginning; otherwise it would not have been twice advanced over the many other cases pending in this court, it is plain to me that it now has no emergency proportions. I would remand it to the District Court for action on the basis of reasoned and informed discretion in the light of necessary facts and argument, consistent with the law in the premises and the guidelines which I have set out regarding September, 1964.

In the United States District Court
For the Southern District of Alabama,
Southern Division.

Birdie Mae Davis et al., Plaintiffs,

vs.

Board of School Commissioners of Mobile County et al., Defendants.

Civil Action.
No. 3963-63.

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION AND SETTING CASE FOR TRIAL.

This cause having been taken under submission on April 25, 1963, on motion for preliminary injunction, with leave given to file briefs; and the court having considered the affidavits filed pursuant to order of court of April 12, 1963, and the briefs filed herein, and having this day filed its findings of fact with opinion, it is now

Ordered, Adjudged and Decreed that:

1. The motion for preliminary injunction is denied.

2. This case is set for trial at 9:30 A. M. on November 14, 1963. Consideration of the defendants' motion to dismiss is reserved until trial of the cause. Defendants shall have twenty days from the date of this order within which to file an answer.

3. Defendants are directed to present at the trial, as a part of their evidence after the completion of plaintiffs' case, a specific plan for the operation of the schools under their authority and control on a racially non-discriminatory basis, consistent with the principles established by the Supreme Court, to commence not later than the beginning of the 1964-65 school year.

Done this 24th day of June, 1963.

/s/ Daniel H. Thomas,
District Judge.

In the United States District Court
For the Southern District of Alabama
Southern Division.

Birdie Mae Davis et al., Plaintiffs, vs. Board of School Commissioners of Mobile County et al., Defendants.	Civil Action No. 3002-63.

FINDINGS AND OPINION ON MOTION FOR PRELIMINARY INJUNCTION.

This cause was submitted on plaintiffs' motion for a preliminary injunction, directing defendants to present for approval of the court, within a period to be determined by the court, a plan for the reorganization of the entire school system of Mobile County, Alabama, into a unitary non-racial system.

The motion purportedly sought relief in the alternative, but the first alternative prayed permanent relief "upon the conclusion of the trial" and hence did not seek interlocutory relief.

The complaint and motion in this case were filed on March 27, 1963. On April 25, plaintiffs urged the granting of the motion and suggested, in open court, without previous notice, thirty days as the period of time to be determined by the court in which defendants should be ordered to submit a plan for the reorganization of the Mobile County School system. The court took the motion under submission on that date, and directed the parties to file briefs within designated times. The court's action in this matter was appealed by plaintiffs, and the appeal

was dismissed by the Court of Appeals by order dated May 24, 1963.

For the reasons stated below, the motion is denied as to the specific relief requested, requiring the presentation of a plan within thirty days. However, an interlocutory order will be entered which will assure the protection of the rights of the plaintiffs.

Based upon the affidavits filed by plaintiffs and respondents and on facts of which the court takes judicial notice, the court makes the following findings of fact.

Findings of Fact.

1. The Mobile County School System is administered by the Board of School Commissioners of Mobile County, a five-man Board. The professional staff is under the direction of a County Superintendent of Education and his several Assistant Superintendents, each being in charge of a particular phase of Board activities.

2. During the school year 1962-63, there were 89 schools in the Mobile County school system, accommodating a pupil load of approximately 75,000 pupils. More than 2,370 teachers are employed in addition to 105 non-teaching school principals and assistants. More than 200 public school buses are operated by the Board in the transportation of school children in Mobile County.

3. The schools of Mobile County are, and have been since the end of World War II, seriously overcrowded. During this period, the pupil load has doubled. Forty-two percent of the increase in the number of pupils in the State of Alabama since 1940, has occurred in Mobile County. The average annual pupil increase has been 3,000.

4. As a result of the rapid growth of the school population, a building program sufficient to house properly

the students fell five years behind. As a consequence, it was necessary to institute half-day or "double" sessions, the number of pupils in double sessions amounting to as many as 14,800 at one time.

5. In an effort to accommodate the pupil load, the School Board has engaged in an accelerated building program, and as a result the physical facilities are gradually overtaking the deficit. The administrative staff of the School Board has employed careful planning to utilize the space available, and throughout this period has resorted to the transportation of pupils from crowded schools nearer their homes to more distant schools where less crowded conditions existed. Many wooden portable classrooms have been constructed and utilized at the more crowded schools. As a result of these efforts, the number of pupils in double sessions has gradually decreased over the years.

6. Fourteen new schools, with more than three hundred rooms, are under construction or are about to be commenced, designed for occupancy in September of 1964. At that time, for the first time since World War II, it is probable that no student within the system will be in double-session classes. However, double sessions must continue through the school year 1963-64.

7. In normal years, in the Mobile County School System, the planning for a school term commences in March before the term beginning in September. The Board of School Commissioners of Mobile County followed the stated practice, and the planning for the session 1963-64 began in March of 1963.

8. Planning by the School Board staff consists of an ascertainment of pupil load based upon careful estimates and formulae derived from the experience of past years. The gross pupil load for each school is then broken down

into class-by-class figures which are furnished to the Assistant Superintendents. Based upon these figures, classes are organized and pupils assigned thereto; the curriculum is established for each school; necessary supplies are determined and ordered; classroom teachers are assigned, involving in many cases individual transfers; and school buses are allocated and routed.

9. The registration of the first-grade pupils for the term 1963-64 was accomplished before the end of the last preceding school term. Each registrant was placed in a class, and teacher assignments made.

10. Substantially all of the planning for the 1963-64 school session has already taken place, and most of the necessary administrative details have been accomplished. Teachers and the administrative personnel of the various schools have largely departed the area for additional professional schooling, or are on vacation, or in other summer employment.

11. Any major re-allocation of pupils, as would be required in a general desegregation process, would require the abandonment of planning already accomplished and the evolving of new plans. Such planning would be more difficult of accomplishment than a normal plan in that the administrative personnel would be without knowledge of pupil distribution, and the formulae evolved in normal years would be inappropriate. Many administrative details already accomplished would require cancellation. It would be necessary that administrative and teaching personnel be available for consultation and study of the problems peculiar to each of the schools involved. Many of these personnel are unavailable.

12. Teaching personnel would have to be re-assigned in many instances. In the realm of teacher assignment and transfer, many human difficulties exist. Consideration

of community needs must be co-ordinated with consideration of individual teacher qualifications and personality. It would be necessary to ascertain the qualifications of each teacher to be assigned to desegregated schools.

13. By reason of limited physical facilities, personnel problems, and administrative commitments, it is not now, nor has it been since the hearing of the motion, reasonably possible to reorganize the school system of Mobile County within such time as to affect the school year 1963-64.

14. The applications by the individual student plaintiffs for transfer to Baker High School during January, 1963, were denied for valid administrative reasons.

Opinion.

Under the circumstances disclosed by the findings of fact, it is clear that the motion for interlocutory relief cannot be granted as a practical matter, independent of other considerations. The radical revision of school attendance areas and other far-reaching administrative changes in the city-county school system contemplated by the motion, simply cannot be managed within the time available. It is very doubtful that it could have been managed within a period of four to six months, even if all teachers and other administrative personnel were available for the entire time—which they are not. It is certain that no such order could now be made effective in the absence of every element which would be essential to its success—time, people, and, in all probability, money.

No plan or basis for general rearrangement of an entire local school system should be required by this or any court without affording to both the school authorities and the public ample time for consideration and discussion of alternatives. The arbitrary, hasty, and premature imposition of a plan would defeat the intended purpose and

would create confusion, and impair the educational process for all pupils.

That it is impossible to predict what specific plan would be required upon the final outcome of this case, is made plain by the decision of Judge Lynne for the Northern District of Alabama in **Armstrong v. Birmingham Board of Education**. That decision was filed on May 28, 1963, after the submission of this motion. It holds, following the decision upholding the validity of the Alabama school placement and related laws by the Supreme Court of the United States in **Shuttlesworth v. Birmingham Board of Education**, 358 U. S. 101 (1958), that the principle of the **Brown** case can be fairly and adequately applied by the school authorities through the processing of applications pursuant to the State laws, and that any denial of constitutional rights in the handling of such applications can be corrected by the District Court on motion or by other proper proceeding.

Although the **Armstrong** decision would not necessarily be controlling here after final hearing, it does furnish a sound and appropriate basis for rejecting the notion that the sweeping reorganization proposed by the motion is now necessary for plaintiffs' protection.

The Fifth Circuit Court of Appeals in its per curiam opinion in this case, handed down on May 24, 1963, had this to say: "The Supreme Court in the second **Brown** case, 1955, 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 and in **Cooper v. Aaron**, 1958, 358 U. S. 1, 78 S. Ct. 1401, 2 L. Ed. 2d 5, wisely left an area of discretion in the desegregation process in the District Courts, feeling that they were close to the local problems, and to school officials, and the children involved."

In line with this, I feel compelled to state here that this court ordered the desegregation of the municipal

golf course in Mobile on the 13th day of March, 1961. That case had been held under advisement for fourteen months. The opinion was written long prior to its release. The time of release was chosen by the court as being opportune, and evidently it was. There has been no incident on the golf course since its integration.

This court took under submission on July 25, 1961, motions to dismiss in the desegregation case involving the facilities of the Mobile Municipal Airport. On October 3, 1961, the motions were denied. The case is still pending, but will be dismissed as moot. The airport facilities have long since been integrated. The court, close to the community and its problems, believed that this would come about voluntarily and without the necessity of judicial enforcement. Relying upon this belief proved providential. There has not been the first incident.

There is now pending in this court a case for the desegregation of the City Bus Lines for the City of Mobile. The City Bus Lines have long since been integrated. There have been no incidents, although the court has never ruled on this case. This case, at the appropriate time, will also very likely be dismissed as moot, though there is one city ordinance which must either be repealed or be stricken down by the Court.

The libraries in the City of Mobile have long since been integrated, though no case was ever filed for their integration. Many drugstore lunch counters in Mobile are integrated, and many chain-store lunch counters have been integrated, though no suits have been filed.

Mobile is perhaps the most desegrated city in the South, with no unfortunate incidents. If and when the appellate courts are called upon to pass on the procedure which the District Court here outlines, is it too much to ask that they be mindful of that area of discretion in the desegregation

process in the District Courts," left by the Supreme Court in the second **Brown** case and approved as wise by the Court of Appeals for this Circuit in the instant case? It is to this court has every reason to believe that the mandate of the court will be honestly, conscientiously and fairly carried out with the least possible, if not complete absence of, [illegible] incidents.

The specific relief prayed for in the motion will be denied. The case will be set for trial on the 14th day of November, 1963. Consideration of the motion to dismiss, filed by the defendants, will be reserved until the trial of the cause. Defendants will be granted twenty days from the date of this order to file an answer.

In addition to any other relevant evidence which defendants may choose to offer, they will be directed to prepare and present at the trial a specific plan for the operation of the schools of Mobile County on a racially nondiscriminatory basis, consistent with the principles established by the Supreme Court, to commence at the beginning of the 1963-64 school year.

Entered this the 24th day of June, 1963.

/s/ Daniel H. Thomas,
District Judge

Office-Supreme Court, U.S.
FILED
DEC 13 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 348

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ET AL.,
Petitioners,

v.

BIRDIE MAE DAVIS, ET AL., *Respondents.*

MOTION UNDER RULE 35 FOR PERMISSION TO FILE APPLICATION FOR LIMITED REHEARING

TO THE HONORABLE HUGO L. BLACK, ASSOCIATE JUSTICE OF THE SUPREME COURT:

Petitioner requests permission to file the annexed petition for limited rehearing out of time on the ground that such filing will permit bringing before this Court for procedural review as a single unit all four of the orders of the Fifth Circuit Court of Appeals in which a District

Court has been reversed and final relief granted by means of an interlocutory appellate injunction. No rehearing on the merits is sought.

The denial of certiorari herein was on October 28, 1963. The twenty-five-day period limited by Rule 58(1) expired on November 22, 1963, at which time your petitioner was not aware of the proposed filing in this Court by the petitioners in the three related cases referred to in the annexed application.

A request for stay pending the earlier application was denied on August 16, 1963, — U.S. —, 84 S. Ct. 10. No stay is being or will be requested with respect to this motion or to the annexed petition if granted.

/s/ George F. Wood
George F. Wood
P. O. Box 935
Mobile 1, Alabama
Counsel for Petitioners

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BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ET AL.,
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BIRDIE MAE DAVIS, ET AL., *Respondents.*

PETITION FOR LIMITED REHEARING AND JOINDER UNDER RULES 46 AND 58

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT:

By petition filed August 8, 1963, the issuance of a writ of certiorari directed to the Fifth Circuit Court of Appeals was prayed to review on its merits an order of the appellate court remanding the action to the District Court for the Southern District of Alabama for such further proceedings as the Court of Appeals had therein directed. The application was denied by this Court on October 28, 1963, 375 U.S. 894.

Petitioner has not and does not now request any rehearing or reconsideration with respect to the merits of the issues contained in its prior application.

The order of the Fifth Circuit Court of Appeals above referred to is one of four original appellate mandatory injunctions issued by the United States Court of Appeals for the Fifth Circuit which have reversed District Court determinations pending appellate review of the merits and are believed to be judicially unique. Your applicant has now learned that the parties subjected to the other three orders are concurrently filing a joint application for review by this Court of the formal validity of those orders.

These other three cases, in which a petition for writ of certiorari is being filed, are *The Board of Education of the City of Birmingham, et al.*, v. *Dwight Aymstrong, et al.*; *Linda Sue Gibson, et al.*, v. *Carolyn Eleanor Harris, et al.*; *and Lawrence Roberts, et al.*, v. *Ralph Stell, et al.*

Inclusion in that application of a rehearing herein, limited solely to the form of the order concerned as a permissible exercise of appellate judicial power, is hereby petitioned. The granting of this relief will bring before the Court as a unit under a joint application the four orders which constitute the entire class of rulings of the type for which review is sought.

I certify that the foregoing petition is presented in good faith and not for delay and is restricted to the ground above specified.

/s/ George F. Wood
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